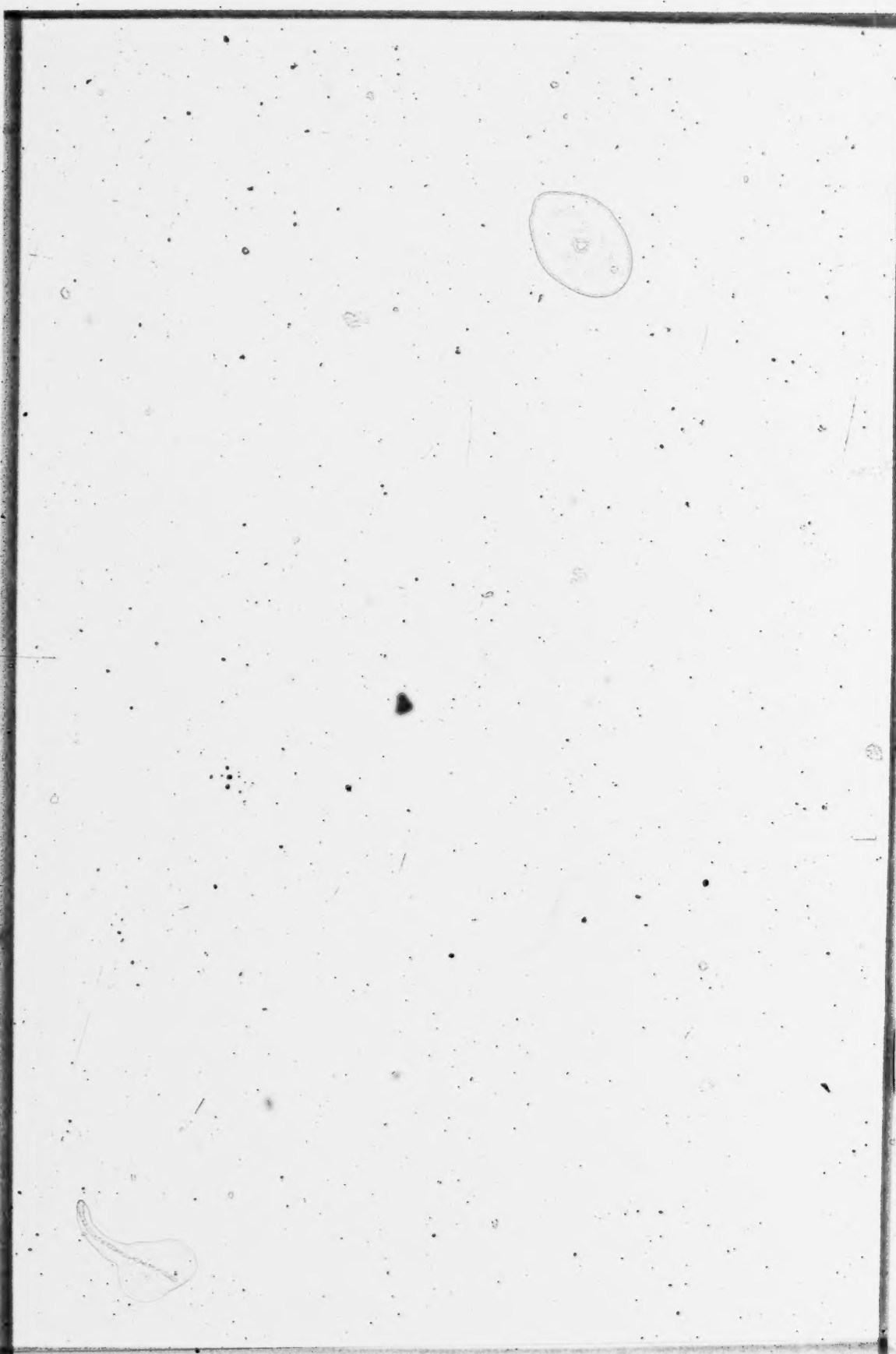

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Supreme Court of the United States

OCTOBER TERM, 1966

No. 1306

CHARLES H. FENTON,
Petitioner,

—against—

A/S GLITTRE, FEARNLEY & EGER
and BARBER LINE,
Respondents.

A/S GLITTRE,
Respondent,

—against—

ATLANTIC STEVEDORING COMPANY, INC.,
and GOLTON MARINE CO., INC.,
Third-Party Respondents.

BRIEF AND APPENDIX OF RESPONDENT, A/S GLITTRE, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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80 Broad Street
New York, N. Y. 10004
Counsel for Respondent, A/S Glittre

THOMAS F. MOLANPHY
Of counsel

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BRIEF AND APPENDIX OF RESPONDENT, A/S GLITTRE, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This was an action by petitioner to recover damages for personal injuries sustained by him on February 14, 1958, while working as a longshoreman in the employ of Atlantic Stevedoring Co., Inc. an independent stevedoring contractor, aboard the m/s Ferngrove, a vessel owned by respondent, A/S Glittre. Petitioner's employer, Atlantic Stevedoring Co., Inc., and a ship repair company, Golton

Marine Co., Inc., were impleaded as third-party defendants. The claim against Golton Marine Co., Inc. was subsequently withdrawn.

Following a pre-trial conference in the United States District Court for the Eastern District of New York, a pre-trial order was consented to by the attorneys for all parties and entered by the Court on October 16, 1963 (R. 485-494; This Appendix 1a-8a). § (i) of the pre-trial order, limiting the issues to be tried, reads as follows:

> "Plaintiff abandoned and waives all of his claims except his claim against the defendant shipowner that the ship was unseaworthy and that such unseaworthiness caused his injuries and damage; contributed thereto. The unseaworthiness complained of is, solely, the alleged encumberance of the deck."

Following trial, without jury, the District Court dismissed plaintiff's complaint and made the following findings of fact[1]:

> "7. At approximately 10:45 on the morning of February 14, 1958, a draft was raised from the dock by the swinging crane and swung rapidly inboard toward hatch No. 3. Because the crane operator did not raise the arm of the crane to a sufficient height, the draft struck a ventilator located at the forward starboard corner of the midship housing, just aft of hatch No. 3. A case of cargo fell from the draft and struck plaintiff, who was standing on deck between the inshore coaming of hatch No. 3 and the inshore rail. The deck area on the inshore side of

[1]Respondent is compelled, at this juncture, to point out that the first two quotations on page 4 of the petition are not findings by the District Court but merely part of that Court's discussion of the evidence.

hatch No. 3 was clear and unobstructed except for a flooring of hatch covers, laid side by side, from the hatch coaming to the rail, which formed a flat walking surface. The accident was witnessed by the Third Officer of the m/s Ferngrove, Erland Skaug, and I credit his testimony.

* * *

"9. I find the sole cause of plaintiff's accident was his own negligence and that of his fellow employee, operating the crane." (R. 662; A. 16a)

On his appeal to the United States Court of Appeals for the Second Circuit, petitioner raised two points which he captioned as follows:

"POINT I

"There is no evidence to support a finding by the court below that the appellant was guilty of contributory negligence.

* * *

"POINT II

"The vessel was unseaworthy by reason of the fact that the draft was not properly made and the deck was encumbered."

In its opinion of December 13, 1966, 370 F. 2d 146, the Court of Appeals noted that the trier of fact found against petitioner on the issues raised in the District Court and refused to disturb those findings. The Court of Appeals further noted that petitioner's claim of an unseaworthy draft had not been pressed at trial. Indeed, any such claim was abandoned by virture of the Pre-Trial Order, quoted above.

REASONS FOR DENYING THE PETITION

(1) The issues raised on page 2 of the petition, under the heading "Questions Presented", were not raised either in the District Court or in the Court of Appeals.

(2) The facts as found by the District Court and unanimously affirmed by the Court of Appeals for the Second Circuit do not pose the questions presented on page 2 of the petition.

(3) There does not exist the purported conflict of opinion among the various Courts of Appeals with respect to the applicable law governing the facts of this case as found by the District Court.

POINT I

PETITIONER MAY NOT ADVANCE, IN THIS COURT, ISSUES WHICH WERE NOT RAISED BELOW.

By the terms of the pre-trial order, consented to by the attorneys for all parties, and entered in the United States District Court for the Eastern District of New York on October 16, 1963 (R. 485-494; A. 1a-8a), petitioner limited his claim against respondent to one of unseaworthiness of the m/s Ferngrove based, solely, upon an allegedly encumbered deck.

The essence of this waiver of all other claims was repeated by petitioner's attorney during the trial (R. 263-264, 320; as referred to in footnote 1 of the Court of Appeals opinion, 370 F. 2d 146).

In its Conclusion of Law No. 2, the District Court stated:

> "By the terms of the pre-trial order, plaintiff abandoned all claims except that of unseaworthiness based upon an alleged encumbered deck" (R. 662-663; A. 17a).

On appeal, the Court stated as follows:

> "In the trial court, plaintiff apparently argued that the ship was unseaworthy (and the shipowner negligent) because of an encumbered deck which proximately caused his injury. The trier of fact found against plaintiff on these issues and also found that the sole cause of the accident was plaintiff's own negligence and that of a fellow employee operating a crane. Plaintiff argues here that these findings must be reversed but we see no reason to disturb them. Plaintiff also claims in this court that the condition of a draft of cargo made the ship unseaworthy as a matter of law and that this caused his injury. The record indicates that these contentions were not pressed at trial; in any event holding the ship unseaworthy on this theory as a matter of law is unjustified on this record" 370 F. 2d 146.

Having had his sole theory of liability rejected by the trier of fact in the District Court and a second theory rejected by the Court of Appeals for the Second Circuit, the petitioner should not now be heard to raise still a third theory of liability in this Court, *Ellis* v. *Dixon,* 349 U. S. 458 (1955); *Lawn* v. *U. S.,* 355 U. S. 339, 362 (footnote); *California* v. *Taylor,* 353 U. S. 553, 557 (footnote); *United States* v. *Howard,* 352 U. S. 212, 217; *Weade* v. *Dichmann Co.,* 337 U. S. 801, 808.

POINT II

THE FACTS AS FOUND BY THE DISTRICT COURT AND UNANIMOUSLY AFFIRMED BY THE COURT OF APPEALS FOR THE SECOND CIRCUIT DO NOT POSE THE QUESTIONS PRESENTED ON PAGE 2 OF THE PETITION.

Respondent, A/S Glittre, submits that the "questions presented" in the petition are, at best, misleading for the following reasons:

(a) Petitioner, in his first question, speaks of "* * * dangerous conditions, other than that of a physical nature * * *" No attempt is made to further specify the dangerous conditions to which petitioner refers or how the question is related to the facts of this case. In fact, a reading of the findings of the District Court (R. 660-664; A. 14a-18a), as affirmed by the Court of Appeals for the Second Circuit, fails to disclose the existence of any such "dangerous conditions" aboard respondent's vessel. Rather, as specifically found by the District Court in finding of fact No. 6:

> "The third-party defendant, Atlantic Stevedoring Company, Inc., was in complete charge of the loading operation and the shipowner provided a vessel, together with gear, which was reasonably seaworthy." (R. 661; A. 16a)

Petitioner has not contested this finding of fact.

(b) Petitioner's second question—as amplified on page 3 of his petition—contains the suggestion that one of his fellow longshoremen was incompetent or inadequate and that respondent's vessel was, thereby, rendered unseaworthy. Petitioner points to no finding of the District Court in support of this suggestion

which, at best, would be another attempt to have this Court pass upon an issue not previously raised below. In addition, under the circumstances of this case, petitioner would suffer from the same absence of proof as was noted in *Arena* v. *Luckenbach S. S. Co.*, 279 F. 2d 186 (1Cir., 1960) cert. den. 364 U. S. 895, where the Court of Appeals for the First Circuit noted at page 189:

> "If a winchman employed by a stevedore negligently lowered a boom onto a longshoreman, it would be true, in a sense, that the longshoreman had not been working in a safe place. But absent a showing that the winchman was an unfit individual we could not say that the vessel was unseaworthy."

As in *Arena*, petitioner, here, can point to no testimony in the record in support of his assertion that he was supplied with less than competent or adequate fellow longshoremen.

POINT III

THERE EXISTS NO CONFLICT AMONG THE COURTS OF APPEALS WITH RESPECT TO THE CONTROLLING PRINCIPLES OF LAW GOVERNING THE FACTS AS FOUND IN THIS CASE.

Respondent does not dispute the petitioner's contention that there exists, among the various circuits, substantial conflict as to whether a vessel is rendered unseaworthy by an *improper method* of loading or discharging cargo by an independent stevedoring contractor, which causes injury to one of its employees. Compare *Arena* v. *Luckenbach S. S. Co.*, 279 F. 2d 186 (1 Cir., 1960) cert. den. 364 U. S. 895; *Spinelli* v. *Isthmian S. S. Co.*, 326 F. 2d 870 (2 Cir., 1964) cert. den. 377 U. S. 935 reh. den. 377 U. S. 1010, motion

for leave to file second pet for reh. den. 379 U. S. 872 with *Thompson* v. *Calmar Steamship Corporation,* 331 F. 2d 657 (3 Cir., 1964) cert. den. 379 U. S. 913; *Blassingill* v. *Waterman Steamship Corporation,* 336 F. 2d 367 (9 Cir., 1964). However, such conflict does not extend to a situation such as the present where a single negligent act, by an employee of an independent contractor in the use of ship's seaworthy gear, causes injury to a fellow longshoreman. This distinction is made clear even in the cases relied on by petitioner, *e.g. Blassingill* v. *Waterman Steamship Corporation,* 336 F. 2d 367 (9 Cir., 1964) where the Court, after holding that an improper method of cargo handling *may* amount to unseaworthiness, stated at page 370:

> "Thus, Blassingill might fail in this case if the only danger was brought about by himself or his fellow longshoremen in not properly placing bales in the particular sling load that injured him."

Again, the record fails to sustain the factual assumptions contained in the questions which petitioner would have this Court review.

CONCLUSION

THE PETITION SHOULD BE DENIED.

J. WARD O'NEILL
80 Broad Street
New York, N. Y. 10004
Counsel for Respondent,
A/S Glittre

THOMAS F. MOLANPHY
Of counsel

APPENDIX

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Filed October 16, 1963

CHARLES H. FENTON, *Plaintiff.* v. A/S GLITTRE et al ATLANTIC STEVEDORING CO., INC. & GOLTON MARINE CO., INC. *Defendants.*	Civil Action No. 1371-61-C-143

PRE-TRIAL ORDER

This matter having come before the Court at a pre-trial conference held before the Honorable John F. Dooling, Jr. USDJ pursuant to Rule 16 of the Federal Rules of Civil Procedure 28, U. S. C. A.; and Jacob Rassner, Jacob N. Geffen, Robert J. Tucker having appeared as counsel for the plaintiff, and, J. Ward O'Neil having appeared as counsel for the defendant, and, Sol Schreiber having appeared as counsel for Atlantic Stevedoring Co., Inc. and Alan H. Buchsbaum for Golton Marine Co.; the following action was taken:

NATURE OF ACTION AND JURISDICTION

This is an action for personal injuries allegedly sustained by an Atlantic longshoreman aboard the Ferngrove when plt allegedly stumbled and fell on an allegedly encumbered deck while seeking to avoid being struck by a draft of cargo

that was allegedly swinging toward him. Negligence and seaworthiness claimed.

The jurisdiction of the Court is invoked under Section 1332 of Title 28 U. S. C. A.

The jurisdiction of the Court is not disputed.*

The jurisdiction of the Court having been disputed, the question was decided as follows:

(Recite additional jurisdictional facts, if necessary.)

II

The following were submitted, ordered filed, and are made a part of this order:

(a) Marked copies of the pleadings; attached.

(b) A statement as to federal court jurisdiction; diversity & jurisdictional amount.

(c) An itemized statement of all special damages claimed on behalf of the plaintiff; medical & hospital $1514.92 (corresponds with lien amt); plt was "out" 2-14-58 thru 12-21-58, 44 2/7 wks (comp. lien for payments $2,391.43) and claims lost wages in that period of $4300. No concessions as to reasonableness of amts of medical & hosp. actual duration of genuine disability. Not denied that comp was paid for period indicated.

(d) A statement of the basis of computation of all general damages claimed on behalf of the plaintiff; see items ELEVEN & FIFTEEN-SIXTEEN. AND TWELVE, of the ans to interrogatories. As to permanency see Nauer letr 4-7-61 attached to ans to interog.

(e) A written stipulation (or statement) of the uncontested facts; see "Deft & 3rd party plt's pretrial memorandum" p. 2 part (b) as amended, attached.

(f) Request for admissions and responsive statements; Golton's ans to the interrog & answers are in the file except ship & except Atlantic ans to the ship and vice-versa. Atlantic will serve its answers, then the ship will serve its answers & Golton will serve its as soon as verified. All parties are in agreement that each party should have a copy of all interogs and answ in the case & they agree to make the necessary exchanges, to bring this about.

(g) Separate lists of the witnesses whom each party will call at the trial of the action, distinctly identifying those witnesses to be called as experts;

Plts wit: see plts pretrial memo p. 3-4. If in advance of trial plt decide to call one or more wits from his class 5, he will so advise the other parties, giving their names.

Deft wit: see his memo p. 4 item 8.

Atlantic wit: p. 2 item E.

Golton wit: see memo; if Golton decides to call an expert on marine practice it will advise the other parties of his identity as soon as determined.

(h) A written statement of the contested issues of fact and of law; see p. 10.

(i) Written waivers of claims and defenses which have been abandoned by the parties; plt abandoned and waives all of his claims except his claim ag the deft ship owner(s) that the ship was unseaworthy and that such unseaworthiness caused his injury & damage, or contributed thereto. The unseaworthiness complained of is, solely, the alleged encumbrance of the deck.

(j) Statements of novel points of law; Grace Line v. Pettus 305 F 2nd 151, also on Atlantic claim-over ag. Golton, availability of active-passive indemnification on relative degrees of fault analysis.

(k) Amendments to the pleadings; the plt's notices of adoption as against Golton & Atlantic are withdrawn and those "pleadings" and the Golton counterpleading are withdrawn. Plt's complt is amended so as to delete the charge of negligence ag the deft ship owner. Atlantic may interpose a counter-claim ag deft substantially as set forth in SEVENTH as p. 4, deft objecting and its objection being overruled on the ground that the essential issue raised is implicit in the case and will not impose additional duties of preparation or necessities of investigation, in connection with the conduct of the litigation. Atlantic & Golton may serve cross-claims ag. each other for indemnification on comparative degree of negligence theories, etc. All allegations of counter-claims and cross-claims served hereunder shall be deemed controverted by denial and avoidance as required.

The foregoing were modified at the pre-trial conference as follows: (If none, recite "None").

None.

III

(A)

It was agreed that the following exhibits for identification presented by the plaintiff and initialled by counsel for the parties were admissible in evidence:

> (Here list the exhibits by identification number and briefly describe them if required to avoid confusion.)

On or before Oct. 30, 1963, plt will serve on the other parties a list of the exhibits that he intends to use at the

trial broken down bet. (a) those that he intends to offer in evid and (b) those that he intends to use in connection with the examination of witnesses for the purposes of refreshing recollection, etc. Within 2 weeks thereafter, deft will serve on all parties a list similarly made up of its exhibits and to which thereafter each 3rd party deft will serve similar lists. Two weeks after the receipt by each party of a list of the exhibits of any other party, the party receiving the list will serve a statement of his objections to the exhibits contained in the list received; such objections are to be specific and not general and directed to the exhibits generally, that is, the objection is a statement of the grounds on which the exhibit will be objected to when offered, or if offered. The list of exhibits and statements of objections shall all be filed and will constitute part of this pretrial order.

Where the other parties do not possess copies of the exhibits contained in the list of exhibits served by a party, the party will either supply a copy of his exhibit with his list or indicate where it may be examined. An exception is made for statements of witnesses which need only be identified and not supplied or made available for examination. Identification of such statement shall include the name of the witness and the date of the statement and whether or not it was signed.

V

The following are the issues of fact to be tried in this action:

(The issues are to be set forth unless clearly and adequately framed by the pleadings, in which case the pleadings are to be referred to.)

Appendix

1. Was the Ferngrove's deck encumbered at the time of plt accid?

2. If so, was the Ferngrove's deck encumbered to such an extent as to create a condition of unseaworthiness as to plt?

3. Was the condition of unseaworthiness, if any, a proximate cause of plt's accident?

4. Did plt's conduct proximately contribute to the happening of the accid and, if so, to what extent?

5. What if any damages did plt sustain by reason of the accid?

Issues on the claim over, see pretrial memo of 3rd party deft Atlantic part (d) issues 5 thru 8.

Issues on claim over against Golton—same as Atlantic's, mutatis mutandis.

VI

The following additional action was taken:

(Here recite all additional action taken. If no such action was taken, recite "None".)

None.

VII

There is reserved to each party the right to call such rebuttal witnesses as may be necessary without previous notice thereof to the adversary party or parties.

The probable length of the trial of this case is 3-7 days.

Counsel who will try the case for the respective parties are: (List names and telephone numbers)

For plaintiff:

Jacob Bassner and Jacob N. Geffen
BA 7-2618

For defendant

J. Ward O'Neil
Di 4-6800

For Atlantic

Mr. Schreiber
Ul 5-8210

For Golton Marine

Mr. Joseph Cohen or Sidney Schwartz
Wh 4-2633

VIII

IT IS ORDERED that this Pre-Trial Order may be modified at the trial of the action, or prior thereto, to prevent manifest injustice, and that such modification may be made either on the application of counsel for the parties or on motion of the Court;

IT IS FURTHER ORDERED that request for instructions shall be submitted to the trial court at the commencement of the trial, but there is reserved to counsel for the respective parties the right to submit supplemental requests for instructions during the course of the trial or at the conclu-

sion of the evidence on matters that cannot be reasonably anticipated.

Dated: Brooklyn, New York,
October 16, 1963

/s/ .....
United States District Judge

APPROVED AS TO FORM AND SUBSTANCE.

/s/ .....
Attorney for Plaintiff

/s/ .....
Defendant and Third Party

/s/ .....
Third Party Atlantic

/s/ .....
Attorney for Defendant Golton

NOTE: Where a third-party defendant is joined pursuant to Rule 14(a) of the Federal Rules of Civil Procedure the pre-trial order may be suitably modified: the initial page may be modified to reflect the joinder and a paragraph identical with paragraphs II and III may be added.

Appendix

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

File 102-4277

CHARLES H. FENTON,
Plaintiff,

—against—

A/S GLITTRE, FEARNLEY and EGER and BARBER LINE,
Defendants.

61 Civ. 143

A/S GLITTRE,
Defendant and Third-Party Plaintiff,

—against—

ATLANTIC STEVEDORING COMPANY, INC., and GOLTON MARINE CO., INC.,
Third-Party Defendants.

October 1, 1964

Appearances:

Jacob Rassner, Esq.
Attorney for Plaintiff

Messrs. Haight, Gardner, Poor & Havens
Attorneys for Defendant and
Third-Party Plaintiff

J. Ward O'Neill, Esq.
Thomas F. Molanphy, Esq.
Of Counsel

Messrs. Fogarty & Schreiber
Attorneys for Third-Party Defendant
Atlantic Stevedoring Co. Inc.

Sol Schreiber, Esq.
Of Counsel

Appendix.

Messrs. Alexander, Ash & Schwartz
Of Counsel to
Hanlon & Dawe, Attorneys for
Third-Party Defendant, Golton
Marine Co. Inc.

Sidney A. Schwartz, Esq.
Joseph Arthur Cohen, Esq.
Of Counsel

BRUCHHAUSEN, D. J.

The plaintiff, a gangwayman, commenced this action to recover damages for injuries, allegedly sustained on February 14, 1958 aboard the vessel M/S Ferngrove owned by the defendant and third-party plaintiff. The plaintiff was employed by the impleaded third-party defendant, Atlantic Stevedoring Company, Inc.

TESTIMONY OF THE PLAINTIFF'S WITNESSES

The plaintiff testified that at 8 A.M. on the said date he boarded the vessel. He then commenced loading operations. He was working on deck, forward of the bulkhead of the aft end of No. 3 batch. Between the hours of 10:30 and 11:00 A.M., the winchman, a co-worker of the plaintiff, was taking general cargo on board. The arm of the crane was not of sufficient height to allow the draft to clear the ventilator. He then walked toward the draft to steady it. The draft broke apart. In attempting to remove himself from harms way, he tripped over beams or hatches, got his foot wedged between the beams, fell backward and thereby sustained personal injuries. He denies that the draft struck the ventilator prior to its parting.

Appendix

The plaintiff's witnesses, Dennis C. Murphy, the hatch foreman and Walter Walterson, a retired longshoreman, did not observe the accident. However, they testified that the deck was cluttered with beams, batch covers and ship's gear.

James Livonni, also one of the plaintiff's witnesses and co-worker and the operator of the winch, testified that he observed the accident. He stated in substance that it was very cold, thus causing the winch to operate in a jerky manner. He further stated that the plaintiff attempted to steady the draft and as he, Livonni, raised the draft the plaintiff was unable to hold it; that the plaintiff went back, that the draft fell apart and one case struck him on the head, that the draft did not strike the ventilator prior to the accident nor did he, Livonni, sign a statement to that effect.

TESTIMONY OF THE DEFENDANTS' WITNESSES

Erland Skaug, the third officer, testified that he was stationed on the starboard inshore side of the raised forecastle, forward of the No. 2 hatch; that he saw the crane raise a draft; that it swung rapidly toward hatch No. 3; that it struck the ventilator; that a piece of the cargo fell off and hit the plaintiff; that the area was clear except for hatch covers which were laid out from the hatch coaming to the rail; that those boards were laid side by side, forming a flat surface and that the hatch beams were not in the proximate area of No. 3 hatch.

The master of the ship, Captain Vaage was the second witness for the defendant. He testified that he was summoned to the scene of the accident and discovered a dent in the starboard ventilator at hatch No. 3 with recently

scraped off paint and that he tested the crane and found it in proper working condition.

The history of the accident taken by Dr. Feinberg from the plaintiff on the day of the accident discloses that the draft struck the ventilator prior to its breaking apart. In the report of the accident, made to the employer that same day it is stated that the draft struck the ventilator prior to its breaking apart. Further, the written statement of Livonni, in part, is as follows:

> "Fenton, the gangwayman, followed the draft, guiding it to the hatch. The draft jerked a little as Fenton tried to steady it. He tripped"—initials of the witness are at this point—"between two beams on deck which had been put on deck the day before by another gang working in that hatch. In falling, Fenton tried to protect himself from falling, grabbed the spreaders, causing the draft to hit the ventilator. The spreader that he held came off, causing the draft to spill and hit him on the head." (R. 296)

At the outset of the trial, the plaintiff responding to a question, said:

> "Then I cleared a path from the coaming of the ship to the gunwail, so I could look onto the deck." (R. 7)

Murphy, the hatch boss, admitted that he had authority to stop work if there was pending danger to the longshoremen, R. 213, and that he made no complaints to his superiors concerning any dangerous conditions of the deck, R. 213.

The credible evidence establishes that the stevedore, Atlantic Stevedoring Company, Inc. was in complete charge of the loading operation and that the shipowner supplied

the longshoremen with a reasonably seaworthy ship together with its gear for the conduct of stevedoring operations. The accident was caused solely by the negligence of the plaintiff and his co-worker, operating the winch.

This Court in Oblatore v. United States, 181 F. Supp. 825, 826, affirmed 289 F. 2d 400, cert. denied 368 U. S. 881, said:

> "In the case of Berti v. Compagnie De Navigation Cyprien Fabre, 2 Cir., 213 F. 2d 397, involving injuries to a longshoreman standing on a hatch cover, the Court said:
>
> > "If plaintiff's injuries resulted solely from the manner in which the work was done under American's supervision, [referring to the stevedore] he has no recourse against Cyprien [the shipowner]."

The determination that the shipowner was not negligent and that the ship was not unseaworthy does not, however, relieve the stevedore from the obligation to pay counsel fees and expenses. Should both parties fail to agree on the amount thereof, a hearing will be scheduled to determine them. Guarracino v. Luckenbach Steamship Company, 333 F. 2d 646.

The record is barren of evidence of improper acts on behalf of Golton Marine Co., Inc. Therefore, it is entitled to a dismissal of all claims and cross-claims made against it.

The defendant shipowner is entitled to judgment in its favor. Settle findings and decree on five (5) days' notice.

WALTER BRUCKHHAUSEN
U. S. D. J.

Appendix

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Filed 11-18-64

CHARLES H. FENTON,
Plaintiff,

—against—

A/S GLITTRE, FEARNLEY and EGER and BARBER LINE,
Defendants.

A/S GLITTRE,
Defendant and Third-Party Plaintiff,

—against—

ATLANTIC STEVEDORING COMPANY, INC., and GOLTON MARINE CO., INC.,
Third-Party Defendants.

61 Civ. 143

PROPOSED FINDING OF FACT AND CONCLUSIONS OF LAW OF DEFENDANT AND THIRD-PARTY PLAINTIFF, A/S GLITTRE.

FINDING OF FACT

1. Plaintiff is a citizen of the United States and a resident of the State of New York, County of Kings. At the time of the incident for which this action has been brought, he was employed as a longshoreman by third-party defendant, Atlantic Stevedoring Company, Inc.

2. Defendant and third-party plaintiff, A/S Glittre, is a corporation organized under and by virtue of the laws of

the Kingdom of Norway. On Febraury 14, 1958, it was the owner of a certain vessel know as the m/s Ferngrove, which was, at the time, at Pier 5, Bush Terminal, Brooklyn, New York.

3. Third-party defendant, Atlantic Stevedoring Company, Inc., was and still is a corporation organized and existing under and by virtue of the laws of the State of New York, and was, on February 14, 1958, the employer of plaintiff.

4. Third-party defendant, Golton Marine Co., Inc., was and still is a corporation organized and existing under and by virtue of the laws of the State of New York and performed certain repair work aboard the m/s Ferngrove between February 4, 1958, and February 14, 1958.

5. On February 14, 1958, third-party defendant, Atlantic Stevedoring Company, Inc., was engaged pursuant to an agreement, in the performance of certain stevedoring activities aboard the m/s Ferngrove. Among these activities, longshoreman in its employ were loading cargo in the No. 3 hatch of the vessel, which is located just forward of the midship housing. The cargo was loaded from the dock into the hatch by means of a swinging crane located at the starboard, (inshore) forward corner of hatch No. 3. At all material times, this crane was operated by James Livonni, a longshoreman employed by third-party defendant, Atlantic Stevedoring Company, Inc. Livonni testified on plaintiff's behalf. Plaintiff was gangwayman at hatch No. 3. It was his job to direct the movements of drafts of cargo being loaded by the swinging crane, by the use of hand signals and commands to the crane operator.

6. The third-party defendant, Atlantic Stevedoring Company, Inc., was in complete charge of the loading operation and the shipowner provided a vessel, together with gear, which was reasonably seaworthy.

7. At approximately 10:45 on the morning of February 14, 1958, a draft was raised from the dock by the swinging crane and swung rapidly inboard toward hatch No. 3. Because the crane operator did not raise the arm of the crane to a sufficient height, the draft struck a ventilator located at the forward starboard corner of the midship housing, just aft of hatch No. 3. A case of cargo fell from the draft and struck plaintiff, who was standing on deck between the inshore coaming of hatch No. 3 and the inshore rail. The deck area on the inshore side of hatch No. 3 was clear and unobstructed except for a flooring of hatch covers, laid side by side, from the hatch coaming to the rail which formed a flat walking surface. The accident was witnessed by the Third Officer of the m/s Ferngrove, Erland Skaug, and I credit his testimony.

8. The swinging crane was tested immediately following plaintiff's accident by the Master of the vessel, Captain Torgier Vaage, and was found to be in proper working condition. I also credit the testimony of Captain Vaage.

9. I find that the sole cause of plaintiff's accident was his own negligence and that of his fellow employee, operating the crane.

CONCLUSION OF LAW

1. The Court has jurisdiction over the parties and over the subject matter of this action, there being the requisite diversity of citizenship.

2. By the terms of the pre-trial order, plaintiff abandoned all claims except that of unseaworthiness based upon an alleged encumbered deck.

3. The plaintiff has the burden of showing by a fair proponderence of the credible evidence that his accident was caused by the unseaworthiness of the vessel or by the negligence of the defendant. *Mosley* v. *Cia. Mar. Adra,* S. A., 314 F. 2nd 223, 228 (2 Cir., 1963); *Freitas* v. *Pacific Atlantic S.S. Co.,* 218 F. 2nd 562, 563 (9 Cir., 1955). Since I have held in finding No. 9 that the sole cause of the accident was the negligence of plaintiff and his fellow longshoremen operating the crane, plaintiff has failed to meet his burden of proof of showing any unseaworthiness of the vessel or negligence of the defendant as alleged. *Mitchell* v. *Trawler Racer, Inc.,* 362 U. S. 539, 550 (1959).

4. The shipowner is not responsible for the manner in which the employees of the third-party defendant, stevedore, performed their work. *Spinelli* v. *Isthmian Steamship Company,* 326 F. 2nd 870 (1964); *Oblatore* v. *United States,* 181, F. Supp. 825, 826, aff'd 289 F. 2nd 400, Cert. denied 368 U. S. 881. *Massa* v. *C. A. Venezuelan Navigacion,* 209 F. Supp. 404, aff'd F. 2nd (2 Cir., 1964).

5. The accident having been caused by employees of the third-party defendant, Atlantic Stevedoring Company, Inc., it must reimburse the defendant and third-party plaintiff, shipowner, for reasonable counsel fees costs and disbursements incurred in defending plaintiff's claim. *Guarracino* v. *Luckenbach Steamship Company,* 333 F. 2nd 646 (2 Cir., 1964).

6. There is no evidence of improper acts on the part of third-party defendant, Golton Marine Co., Inc., and all claims asserted against it are dismisesd.

7. The complaint of the plaintiff is dismissed.

Dated: Brooklyn, New York, in said district of this 18th day of Nov., 1964.

s/ WALTER BRUCHHAUSEN
U. S. D. J.

Appendix

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 254—September Term, 1966.

(Argued December 9, 1966 Decided December 13, 1966.)

Docket No. 29950

CHARLES H. FENTON,

Plaintiff-Appellant,

—against—

A/S GLITTRE,

Defendant-Appellee,

—and—

FEARNLEY AND EGER and BARBER LINE,

Defendants.

A/S GLITTRE,

Defendant and Third-Party Plaintiff-Appellee-Appellant,

—against—

ATLANTIC STEVEDORING COMPANY, INC. and GOLTON MARINE CO., INC.,

Third-Party Defendants-Appellees.

Appendix

Before:

LUMBARD, *Chief Judge,*
HAYS and FEINBERG, *Circuit Judges.*

Appeal by plaintiff from judgment for defendant-appellant A/S Glittre in the United States District Court for the Eastern District of New York, Walter Bruchhausen, *J.*, dismissing plaintiff's complaint and appeal by A/S Glittre as third-party plaintiff from judgment dismissing its claim for indemnity against Golton Marine Co., Inc. Judgment dismissing plaintiff's complaint affirmed. A/S Glittre's appeal as third-party plaintiff withdrawn in open court.

JACOB RASSNER, New York, N. Y. (Alan C. Rassner, on the brief), *for Plaintiff-Appellant.*

J. WARD O'NEILL, New York, N. Y. (Haight, Gardner, Poor & Havens, Thomas F. Molanphy, on the brief), *for Defendant and Third-Party Plaintiff-Appellee-Appellant.*

JOSEPH ARTHUR COHEN, New York, N. Y. (Alexander, Ash & Schwartz, Sidney A. Schwartz, on the brief), *for Third-Party Defendant-Appellee, Golton Marine Co., Inc.*

PER CURIAM:

Plaintiff longshoreman appeals from a judgment for defendant shipowner entered in the United States District Court for the Eastern District of New York after a non-

jury trial. In the trial court, plaintiff apparently argued that the ship was unseaworthy (and the shipowner negligent) because of an encumbered deck which proximately caused his injury. The trier of fact found against plaintiff on these issues and also found that the sole cause of the accident was plaintiff's own negligence and that of a fellow employee operating a crane. Plaintiff argues here that these findings must be reversed but we see no reason to disturb them. Plaintiff also claims in this court that the condition of a draft of cargo made the ship unseaworthy as a matter of law and that this caused his injury. The record indicates that these contentions were not pressed at trial;[1] in any event, holding the ship unseaworthy on this theory as a matter of law is unjustified on this record. Accordingly, the judgment for defendant shipowner dismissing plaintiff's complaint is affirmed. The shipowner's "protective" appeal against third-party defendant Golton Marine Co., Inc. was withdrawn in open court.

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[1] *E.g.*, appellant's appendix, pp. 175a, 207a.